DOCKET FILE COPY ORIGINAL

RECEIVED

NOV 17 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 17, 2000

Via Hand Delivery

Magalie Roman Salas
Secretary
Federal Communications Commission
Filing Counter TW-A325, 12th Street Lobby
445-12 Street, S.W. - Portals II
Washington, D.C. 20554

Re: ***In the Matter of 2000 Biennial Regulatory Review Policy and Rules Concerning the International, Interexchange Marketplace - IB Docket No. 00-202***

Dear Ms. Roman Salas:

Enclosed please find an original and four (4) copies of Comments of Global Telecompetition Consultants, Inc. in Response to Notice of Proposed Rulemaking in the above-referenced proceeding.

An additional copy of this filing is enclosed to be date-stamped and returned in the envelope provided for this purpose.

Should there be any questions, kindly contact the undersigned.

Respectfully submitted,

Loubna W. Haddad
Counsel for Global Telecompetition
Consultants, Inc.

Enclosures

No. of Copies rec'd 0+4
List ABCDE

GLOBAL TELECOMPETITION CONSULTANTS
8260 Greensboro Drive, Suite 240 • McLean, Virginia 22102
Telephone 703-714-1320 • Fax 703-893-2763 • rhampton@nucent.com

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2000 Biennial Regulatory Review	)	
	)	**IB Docket No. 00-202**
Policy and Rules Concerning the International, Interexchange Marketplace	)	
	)	

COMMENTS OF GLOBAL TELECOMPETITION CONSULTANTS, INC. IN RESPONSE TO NOTICE FOR PROPOSED RULE MAKING

8260 Greensboro Drive
Suite 240
McLean, Virginia 22102
(703) 917-4394

November 17, 2000

SUMMARY

The Federal Communications Commission's ("FCC") announced position that the filed tariff doctrine has been overturned is without legal support. The FCC's 1996 Order on mandatory detariffing of domestic, interstate, interexchange services did not overrule the filed tariff doctrine, and the FCC's reliance on that premise in its October 18, 2000 Notice of Proposed Rulemaking concerning international, interexchange services is misplaced.

First, the filed tariff doctrine is a judicially created doctrine that can only be overturned by the Supreme Court or by an Act of Congress. The filed tariff doctrine is a judicially created doctrine based on statutory interpretation and dates back to the early 1900s. Under the well-established legal principle of "stare decisis", the FCC lacks the authority and jurisdiction to interpret the Telecommunications Act in any way that conflicts with the Supreme Court's interpretation of the Act. The FCC has no authority to change the laws or regulations put into effect by Congress as interpreted and applied by the Supreme Court - only Congress, by legislative enactment, may modify or overturn a Supreme Court precedent. Moreover, under the principle of Separation of Powers, the FCC has no power to review, much less to overturn or narrow decisions of the Supreme Court.

Second, the FCC's decision was arbitrary and capricious. Pursuant to the Administrative Procedures Act, a court may set aside an agency decision that is arbitrary and capricious. The court will look to see if the agency made a rational connection between the facts found and its decision and that the agency made clear its course of

inquiry, its analysis and rationale. The FCC's conclusion that detariffing eliminates the possible invocation of the filed tariff doctrine does none of the above.

Third, the FCC violated the Regulatory Flexibility Act by not outlining how the elimination of the doctrine would affect small businesses. Under the Regulatory Flexibility Act, final agency rules must contain an analysis of the steps taken to minimize the significant economic impact on small entities, including why each one of the other significant alternatives was rejected. The FCC shirked this responsibility by failing to address how it reached its conclusion, how mandatory detariffing would definitively eliminate the possible invocation of the doctrine, how the elimination of the doctrine would affect small carriers or the steps it has taken to minimize these affects.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
2000 Biennial Regulatory Review	)	
	)	**IB Docket No. 00-202**
Policy and Rules Concerning the International, Interexchange Marketplace	)	
	)	
	)	

COMMENTS OF GLOBAL TELECOMPETITION CONSULTANTS, INC.

Global Telecompetition Consultants, Inc. ("GTC"), by its attorneys, hereby submits these comments in response to the Federal Communications Commission's ("FCC or Commission") October 18, 2000 Notice of Proposed Rule Making ("NPRM") concerning the international, interexchange marketplace.[1]

Introduction

GTC is a management consulting firm offering experienced consulting services and advice to the telecommunications industry. In addition, through its affiliated organization, the Global Alliance for Telecommunications or "GAT," GTC seeks to promote the rapid and effective development of competition for all telecommunications service providers, with special care and concern for new entrants and smaller entities faced with the task of bringing their innovation, zeal for customer service and competitive pricing, to a marketplace entrenched with the stiff opposition and unique advantages of incumbent monopoly carriers.

---

[1] *Policy and Rules Concerning the International, Interexchange Marketplace, Notice of Proposed Rule Making*, IB Docket No. 00-202, FCC 00-367 (rel. October 18, 2000).

GTC applauds the FCC's efforts in implementing the purposes of the Telecommunications Act of 1996 ("Act"), which are to establish "a pro-competitive deregulatory national policy framework." These goals are critical in providing telecommunications services to customers, especially residential consumers, at fair and reasonable rates. However, GTC believes that the Act's purpose will not be reached by the FCC's attempted abolition of the filed tariff doctrine, because the administrative and ministerial burden on carriers, especially small carriers, will be prohibitively expensive. In fact, the FCC recently extended the transition period from January 31, 2001 to April 30, 2001 for detariffing of domestic interexchange service, and GTC believes that the burden of detariffing of international services is even greater because of the size and complexity of international rate tables. As such, the FCC should create an equally long period to detariff international tariffs. Notwithstanding the transition period allowed, it is GTC's position that detariffing, be it of domestic or international interexchange services, is not equivalent to the abolition of the filed tariff doctrine.

In its October 1996 Order directing the mandatory detariffing of domestic, interstate, interexchange services, the FCC repeatedly states that the absence of tariffs will eliminate the possible invocation of the filed rate (or tariff) doctrine.[2] Most companies, carriers and attorneys have interpreted these statements as doing away with the filed tariff doctrine. The FCC has furthered this flawed interpretation in its October 18, 2000 NPRM. Specifically, the FCC reiterates therein that "only with complete detariffing can we be certain to avoid the uncertainty, confusion, and potential harm to

[2] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Report and Order,* CC Docket No. 96-61, FCC 96-424 (rel. October 31, 1996).

consumers associated with the 'filed-rate' doctrine." *NPRM* at ¶ 15; *see also Id.* at ¶ 19 ("the absence of tariffs will also eliminate the possible invocation by carriers of the 'filed-rate' doctrine . . . ."). Such interpretation of the FCC's statements is contrary to law, and hence invalid, as explained below.

I. The Filed Tariff Doctrine is a judicially created doctrine that can only be overturned and/or modified by the Supreme Court or by an Act of Congress

The filed tariff doctrine originated from the interpretation of the Interstate Commerce Act ("ICA") of 1887. The first case discussing the ICA's prohibition against discrimination and requirement that published rates be adhered to was *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 US 361, 26 S.Ct. 272 (1905). In that case, the Supreme Court noted that the purpose of the act "was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purposes which it was enacted to subserve." *Id.* at 391, 277; *see also Armor Packing Co. v. United States*, 209 US 56, 80 28 S.Ct. 428, 435 (1908) ("if the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart . . . Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.").

Since at least as far back as 1915, the Supreme Court has recognized that the doctrine may work hardship in certain cases, "but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination." *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915).

In 1996, Congress enacted the Telecommunications Act, with similar language as the ICA. Courts have applied the filed tariff doctrine under the ICA to the Communications Act using the same rationale. *See American Telephone and Telegraph Company v. New York City Human Resources Administration*, 833 F. Supp. 962, 979 (S.D.N.Y. 1993); *see also MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) ("The Communications Act, of course, was based upon the ICA and must be read in conjunction with it."); *American Broadcasting Cos. V. FCC*, 643 F.2d 818, 820-821 (D.C. Cir. 1980) ("To understand the purposes of the Communications Act . . . we must look to the legislative history of the Interstate Commerce Act of 1887, for the Communications Act borrowed its language and purpose from the Interstate Commerce Act.").[3]

The filed tariff doctrine under the Communications Act requires a regulated carrier to charge the tariff rate established with the regulatory agency, even if it has quoted a lower rate to its customer. To do otherwise would give a preference to, and discriminate in favor of one customer over another. *Marco Supply Co. v. American Tel. & Tel. Communications, Inc.*, 875 F.2d 434, 436 (4th Cir. 1989). Even where the carrier's representation is fraudulent, the aggrieved customer cannot assert that he should be

[3] Additionally, cases decided under the ICA are controlling precedent for interpreting the effect of tariffs filed under the Communications Act because common carrier communications companies were regulated under the ICA prior to the enactment of the Communications Act. *MCI v. Best Telephone Co., Inc.*, 898 F. Supp. 868, 872 n.1 (S.D. Fla. 1994); *see also American Broadcasting Cos.*, 643 F.2d at 821 n. 2; *Electronic Indus. Asso. v. FCC*, 554 F.2d 1109, 1115 n. 16 (D.C. Cir. 1976).

charged the quoted rate because customers are presumed to know what the applicable tariff is. *Id.*

In 1998, two years following the passage of the Telecommunications Act of 1996 and the FCC's adoption of its October 1996 Order mandating detariffing, the Supreme Court, Justice Scalia writing for the majority, unequivocally reaffirmed the principles and applicability of the filed tariff doctrine to telecommunications carrier services, stating that strict application of the doctrine is necessary to avoid discriminatory pricing and noting that this policy is at the heart of Title II, the common carrier section of the Communications Act of 1934, as amended by the 1996 Telecommunications Act. *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 US 214, 118 S.Ct. 1956 (1998).

Thus, there can be no doubt that the filed tariff doctrine is a long-standing, judicially created doctrine that the courts continue to apply, even in the aftermath of the October 1996 Order. *See Allworld Communications Network, L.L.C. v. MCI WorldCom, Inc.*, 2000 WL 1013956 (SDNY, July 24, 2000) (filed rate doctrine bars state law claims); *Guglielmo v. WorldCom, Inc.*, 2000 WL 1507426 (D. NH, July 27, 2000) (artful pleading doctrine cannot be used to circumvent general rule that a preemption defense like the filed rate doctrine does not justify removal, therefore the case is remanded to state court); *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*, 111 F.Supp.2d 867 (SD Tex. 2000) (filed rate doctrine is inapplicable where the defendants charged plaintiffs above tariffed rates); and *Evans v. AT&T Corp.*, 2000 WL 1585603 (9th Cir., October 25, 2000) (filed rate doctrine bars challenge of carrier's pass-through fee of USF).

In its numerous Notices of Proposed Rule Making (NPRM) and Orders on the issue of detariffing, the FCC has time and again recognized that the filed rate doctrine is a long held legal doctrine created by judicial decision applying the express words of a federal statute. *See October 31, 1996 Second Report and Order* at ¶ 55, 60 (The FCC notes that "courts have long held in a situation where a filed tariff rate, or other term or condition, differs from a rate, term, or condition set in non-tariffed carrier-customer contract, the carrier is required to impose the tariffed rate, term or condition." In discussing permissive detariffing, the Commission again recognizes that "the filed rate doctrine is a legal doctrine developed by judicial precedent."); *August 20, 1997 Order on Reconsideration* at ¶ 3[4] (Noting that the concepts behind the filed rate doctrine are "pursuant to doctrine articulated by the courts."); and *March 31, 1999 Second Order on Reconsideration and Erratum*[5] at ¶ 1 ("under the judicially created 'filed-rate' doctrine, the tariffed rate for a services is the only lawful rate that the carrier may charge for that service.").

Given that the doctrine is a judicially created mandate, the principle of stare decisis prevents the FCC from interpreting the same language in a contradictory manner. Once a court has determined a statute's clear meaning, courts must adhere to that determination and judge an agency's interpretation of the statute against the court's prior determination of the statute's meaning. *Maislin Industries, U.S. v. Primary Steel, Inc.*,

---

[4] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Order on Reconsideration,* CC Docket No. 96-61, FCC 97-293 (rel. August 20, 1997).

[5] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Order on Reconsideration and Erratum,* CC Docket No. 96-61, FCC 99-047 (rel. March 31, 1999).

497 US 116, 131 110 S.Ct. 2759, 2768 (1990). In this case, the filed tariff doctrine is a result of the Supreme Court's interpretation of the ICA and the 1996 Telecommunications Act. The Commission cannot deny this. As such, the Commission lacks the authority and jurisdiction to interpret the Act in any way that conflicts with the Supreme Court's interpretation.

Aside from the Court itself, the only authority to alter Supreme Court precedent is Congress. In concluding that the doctrine is dead, the FCC states that in today's competitive environment, the doctrine does not protect consumers and goes against the public interest. This boot-strap rationalization does not and cannot support the FCC's intent and desire to abolish the filed tariff doctrine.

Because a regulatory agency believes circumstances have changed to such a degree as to undermine established polices, laws or regulations, such changed circumstances, no matter how seemingly well documented, do not vest in an agency the powers it does not have to itself change the laws or regulations put into effect by Congress as interpreted and applied by Supreme Court. Only Congress, by legislative enactment, may modify or overturn a Supreme Court precedent. Until that time, the courts are bound to enforce the precedent and the FCC's conclusion that the doctrine is dead is legally meaningless and without effect. The Supreme Court has recognized these basic principles as far back as 1908. In *Armour Packing Co*, the Court stated that the filed rate doctrine, "it is insisted, puts the shipper in many kinds of trade at the mercy of the carrier, who may arbitrarily change a rate upon the faith of which contracts have been entered into [and, thus, should not be applied]. But the right to make such regulations is inherent in the power of Congress to legislate respecting interstate commerce, ***and such***

considerations of inconvenience and hardship address themselves to the law-making branch of the government." *Armour Packing Co*, 209 U.S. at 81-82 (emphasis added).

The Court continues to apply the above principle, with vigor and persistence, to agency attempts to contravene the filed rate doctrine. In *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759 (1990), a case brought under the ICA, the Court determined that an Interstate Commerce Commission ("ICC") policy effectively negating the filed tariff doctrine was invalid as being inconsistent with the Act and noted that such action is strictly within the realm of Congress' legislative powers. Under the ICA, motor common carriers must publish and file rates with the ICC and are prohibited from providing services at any rate other than the filed rate. "As the Court has frequently stated, the statute does not permit either a shipper's ignorance or the carrier's misquotation of the applicable rate to serve as a defense to the collection of the filed rate." *Id.* at 120, 2763. Notwithstanding, in 1986, the ICC determined that due to changes in the motor carrier industry, a toning down of this harsh rule was warranted and, accordingly, implemented a policy of allowing carriers and shippers to negotiate rates. The ICC reasoned that "the passage of the Motor Carrier Act of 1980, which significantly deregulated the motor carrier industry, justified the change in policy, for the new competitive atmosphere made strict application of the [file tariff doctrine] unnecessary to deter discrimination." *Id.* at 121, 2763. Moreover, it reasoned that the passage of the Motor Carrier Act of 1980 and the Commission's exemption of all motor contract carriers from the filing requirements justified its policy. Finally, the ICC argued that due to the more competitive environment, strict adherence to the filed rate doctrine was not necessary to avoid discrimination in this day and age.

The Court rejected these arguments and deemed the ICC's policy inconsistent with the ICA and invalid. The Court rationalized that the doctrine, which has long governed the legal relationship between shippers and carriers, is essential to preventing price discrimination. Given the close interplay between the duty to file a tariff and not stray from its rates and the prohibition on discrimination in the statute, the Court held that it must "read the statute to create strict filed rate requirements and to forbid equitable defenses to collection of the filed tariff." *Id.* at 126-127, 2766. The Court went on to note that "Congress has not diverged from this interpretation and we decline to revisit it ourselves. . . Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning. . . ." *Id.* at 131, 2768. Finally, the Court rejected the ICC's arguments that the Motor Carrier Act of 1980, the exemptions from tariffing and the more competitive environment justified its policy, stating that "although the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry . . . it does not have the power to adopt a policy that directly conflicts with its governing statute." *Id.* at 134, 135, 2770. Accordingly, the Court concluded "if strict adherence to [the ICA requirements] as embodied in the filed rate doctrine has become an anachronism in the wake of the MCA, it is the responsibility of Congress to modify or eliminate these sections." *Id.* at 136, 2771.[6] The same should hold true for the Communications Act requirements embodied in the filed rate doctrine.

[6] Ultimately, Congress did address this issue with the Negotiated Rates Act of 1993, effectively overturning the Supreme Court's decision in *Maislin* invalidating the ICC's Negotiated Rates Policy. It was held that Congress' actions in overturning this decision through legislative enactment was not a violation of the Separation of Powers Doctrine, recognizing that "through its legislative power, Congress

Finally, under the principle of Separation of Powers, judgments of Article III courts, most importantly the Supreme Court, are not subject to review by the other branches of government. It is a constitutional principle that Article III courts may not render advisory opinions. *Town of Deerfield, New York v. Federal Communications Commission*, 992 F.2d 420, 427 (2nd Cir. 1992). Accordingly, "a judgment entered by an Article III court having jurisdiction to enter that judgment is not subject to review by a different branch of the government, for if a decision of the judicial branch were subject to direct revision by the executive or legislative branch, the court's decision would in effect be merely advisory." *Id.* at 428. "Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no power." *Id.*

Therefore, based on the above analysis, the FCC was completely without power to review, let alone attempt to overturn, the long held Supreme Court created filed tariff doctrine.

II. The FCC's decision was arbitrary and capricious

In affirming the FCC's October 1996 Order, the D.C. Circuit Court of Appeals repeatedly made reference to the FCC being entitled to *Chevron* deference, meaning that agency interpretations of their own regulations are entitled to substantial deference. While this may be true, such agency interpretation may be set aside where a court finds that "it is the product of a decisionmaking process deemed arbitrary or capricious, or if it lacks factual support." *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1575-1576

---

can overturn or modify any United States Supreme Court decision, other than one turning on an interpretation of a constitutional provision." *Maislin Industries, U.S., Inc. v. A.J. Hollander Co.*, 176 B.R. 436445 (1995).

(10th Cir. 1994); *see also Necketopoulos v. Shalala*, 941 F. Supp. 1382 (SDNY 1996). This authority is vested in the courts under the Administrative Procedures Act. In reviewing an agency action under this standard, the court must determine "whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made. *Olenhouse*, 42 F.3d at 1574. Moreover, the court must find that the agency made clear its course of inquiry, its analysis and the rationale behind its ultimate decision. *Id.* at 1575.

The FCC's conclusion that detariffing eliminates the possible invocation of the filed tariff doctrine does not meet the above standards. First, in its March 25, 1996 NPRM, the FCC makes the conclusory statement, with nothing more, that "the absence of tariffs would eliminate possible invocation by carriers of the filed rate doctrine."[7] ¶ 34. Moreover, it does not directly seek any comments on this conclusion.

Second, in its October 31, 1996 Second Report & Order, which mandates full detariffing, the Commission made conclusions that the filed tariff doctrine is not in the public interest and does not protect consumers, but neglected to provide any analysis. More specifically, the Commission found "complete detariffing would also further the public interest by eliminating the ability of carriers to invoke the 'filed-rate' doctrine." *Second Report & Order* at ¶ 55. While, in the next breath, the Commission recognized that the doctrine is a long held legal precedent, it made no attempt to analyze how detariffing would eliminate the filed-rate doctrine, nor did it attempt to justify its apparent position that it has authority to overturn long held judicial precedent.

---

[7] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rule Making,* CC Docket No. 96-61, FCC 96-123 (rel. March 25, 1996).

Third, in rejecting the concept of permissive tariffing in the August 20, 1997 Order on Reconsideration, the Commission discussed the harmful effects of the filed tariff doctrine to carrier-customer relationship and customers who sign up for long-term service contracts. In addition, it rejected arguments that the doctrine benefits customers "by creating certainty in the carrier-customer relationship." *Order on Reconsideration* at ¶ 12. However, at no point did the Commission set out its analysis and rationale for concluding that detariffing would eliminate the invocation of the filed tariff doctrine. In its October 18, 2000 NPRM on International detariffing, the Commission again sets forth the same conclusions without the requisite analysis.

Finally, in its March 31, 1999 Second Order on Reconsideration and Erratum, the Commission made the sweeping conclusion that the doctrine should not apply to the public disclosure requirements because the public disclosure requirement is not a "filing requirement" under the Act. Again, the Commission failed to provide any analysis or rationale for this determination. It should be noted that this is not the last word on the subject. Agency statutory interpretation is subject to court review and, while afforded a certain degree of deference, courts are the final word on statutory interpretation. *See Chevron, USA, Inc. v. National Resources Defense Council*, 467 U.S. 837, 843 n. 9, 104 S.Ct. 2778, 2782 n. 9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."); *Sicard v. City of Sioux County*, 950 F. Supp. 1420, 1435 (N.D. Iowa 1996) ("the final power of interpretation is in the courts.").

In short, the Commission statements are replete with conclusions that detariffing will kill the doctrine and minor discussions of why it is should be dead. But the FCC

totally fails to set out any analysis and rationale **why** the mere refusal to continue to accept paper/electronic filings at the FCC, the only legitimate aspects of detariffing the FCC may have the power to pursue, overturns and nullifies the doctrine and, more importantly, totally fails to provide any analysis or justification supporting the Commission's authority to make such a determination. All of the rationale in the Commission's Orders goes to support its conclusion that tariff requirements are no longer necessary. As an ancillary to this conclusion, the Commission has concluded that the absence of tariffs will eliminate the filed tariff doctrine. Just as it justified its primary conclusion, the Commission must justify this secondary conclusion. Its failure to do so clearly evidences a decisionmaking process that is arbitrary and capricious and lacking any "rational connection between the facts found and the decision made." *Olenhouse*, 42 F.3d at 1575.

Tangentially, but equally relevant, the FCC's decision is arbitrary and capricious because it circumvents the balance of interest Congress achieved in enacting the language of § 203(c). Courts have repeatedly held that the specific scheme intended by Congress' enactment of §§ 203-205 of the Communications Act was based on a careful balance of competing interest and the Commission may not ignore that balance or rewrite this statutory scheme based on its own interpretation of the interests involved. *See Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (DC Cir. 1995); *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (DC Cir. 1985); *AT&T v. FCC*, 487 F.2d 865 (2nd Cir. 1973). While these cases are admittedly pre-1996 Telecommunications Act, the rationale remains unscathed. In asserting that its detariffing policy abolishes the filed tariff doctrine, the FCC is effectively discounting the delicate balance of interest at which

Congress arrived in enacting § 203(c). There can be no argument that the Commission may not "rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation." *Southwestern Bell Corp.*, 43 F.3d at 1520 (citation omitted). It bears repeating that if the Commission believes that the mandates of the Telecommunications Act are "inadequate to the task of regulating the telecommunications industry in light of changed circumstances, the Commission must take its case to Congress." *Id.* at 1519. Any other FCC action under such circumstances clearly would be arbitrary and capricious and subject to doubt.

III. The FCC violated the Regulatory Flexibility Act by not outlining how the elimination of the doctrine would affect small businesses.

Under the Regulatory Flexibility Act, final agency rules must contain an analysis "of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 USCA § 604(a)(5).

The FCC shirked this responsibility in clear violation of the Regulatory Flexibility Act. In making its analysis in the October 1996 Order, the FCC only notes that its decision to detariff will benefit all consumers, some of whom are small business entities. In addition it summarily rejects arguments that full detariffing will harm small nondominant interexchange carriers. The analysis only mentions the filed tariff doctrine in the context of rejecting permissive tariffing, where the Commission states: "we believe that detariffing on a permissive basis would not definitively eliminate the possible invocation of the 'filed-rate' doctrine and would create the risk of price signaling. We

believe that only with complete detariffing can we definitively eliminate these possible anticompetitive practices and protect consumers, some of which are small business entities." *Second Report & Order* at ¶ 154 (emphasis added). In addition, the Commission asserts that the "public interest benefit of removing carrier ability to invoke the 'filed-rate' doctrine" applies to terms and conditions just as much as to rates. *Id.* at ¶ 155.

Such perfunctory analysis of the doctrine does not meet the requirements set out in the Regulatory Flexibility Act. The FCC's analysis fails to address (i) how the Commission reached such a conclusion, (ii) how mandatory detariffing would definitively eliminate the possible invocation of the doctrine, (iii) how the elimination of the doctrine would affect small carriers or (iv) the steps it has taken to minimize these effects. Thus, even assuming that the Commission has the power to reconsider and overturn established Supreme Court doctrine, it neglected to follow the necessary procedural steps in doing so.

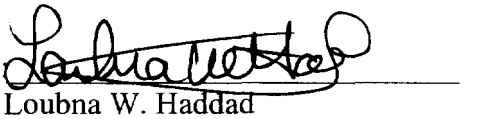
IV. Conclusion

In conclusion, in effecting mandatory detariffing, the FCC has attempted to overturn the filed tariff doctrine through assumptions of fact and authority that do not exist. While the Commission may have authority to order mandatory detariffing, it does not have the authority to abolish judicial precedent, or Congressional mandates as interpreted and applied by such precedent, both of the latter of which have unequivocally reaffirmed the filed tariff doctrine. Irrespective of the FCC's ignoring its lack of authority to act as it attempts to do, the FCC also failed to follow the proper procedure

under the Administrative Procedure Act and the Regulatory Flexibility Act, thus, further undercutting its ultra vires attempts to do away with the doctrine.

Respectfully submitted,

Global Telecompetition Consultants, Inc.

By 

Loubna W. Haddad
Mac McIntyre
Its Counsel

8260 Greensboro Dr.
Suite 240
McLean, VA 22101
(703) 917-4394
(703) 893-2763 (fax)

CERTIFICATE OF SERVICE

I, Loubna W. Haddad, Counsel for Global Telecompetition Consultants, Inc., do hereby state and affirm that copies of the foregoing "Comments of Global Telecompetition Consultant's, Inc. in Response to Notice of Proposed Rulemaking," in IB Docket No. 00-202, were delivered upon the following via hand delivery, this 17th day of November, 2000.

Magalie Roman Salas (Original + 4 Copies)
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Filing Counter TW-A325, 12th Street Lobby
Washington, D.C. 20554

Ms. Peggy Reitzel (3.5 inch Diskette)
International Bureau
Telecommunications Division
Federal Communications Commission
445 Twelfth Street, S.W.
Room 6A822
Washington, D.C. 20554

International Transcription Service, Inc. (One Copy)
1231 20th Street, N.W.
Washington, D.C. 20036

Loubna W. Haddad